are merely relative terms incapable of precise definition except as applied to the particular facts of each case. The scope of the authority of a general agent is, in general, broader than that of a special, *Mars* v. *Mars*, 27 S. C. 132, but it is entirely proper to refer to the same agent as either general or special, according as the emphasis is on the extent or the limitations of his powers. The terms are not precise, but used in this way they are often convenient. In any case the liability of the principal can not be settled by calling the agent a general agent or a special agent. If the act done by the agent, general or special, was within the real or apparent scope of his authority the principal will be bound. If it was not, the principal is not liable, regardless of whether the agent was general or special, or whether he acted under a general or a special authority. No objection can be taken to defining, as in the present case, what are the limits of the authority of a "general agent" of a telegraph company, and then announcing that limitations beyond those to be implied from the nature of the employment are not binding on third persons unless they are informed of them. But it would be open to the objections above pointed out to say that limitations are not binding because the agency is a general one. E. C. G.

MUNICIPAL ORDINANCES LICENSING TRADES AND OCCUPATIONS.—The validity of these ordinances and of the licenses imposed under them is a matter which has come before the courts with increasing frequency within the last fifteen or twenty years. The Supreme Court of Kansas has considered the question in the recent case of *City of Lebanon* v. *Zanditon*, 89 Pac. Rep. 10 (Feb. 9, 1907). The defendant was convicted of violating an ordinance of the city of Lebanon which provided that no transient merchant should be permitted to sell or offer for sale at retail any article of merchandise usually kept for sale by any merchant or manufacturer of the city within the limits of the city, without first paying a license tax of $10 per day. The penalty was a fine of not less than $5, nor more than $25 for each offense, and each day's violation should be considered a separate offense. The defendant, carrying a stock of clothing and furnishings, averaging $5,000 in value, was charged in the complaint upon 19 separate counts and was fined $304.00, or $16 for each day. The city had a population of about 700 people and was therefore, under the statutes of Kansas, a city of the third class. The cities of this class are empowered by the General Statutes of 1901, Sec. 1127, to license various trades and occupations. Such license tax, however, must be just and reasonable. Gen. St. 1901, Sec. 1128. Evidence was introduced in the lower court tending to prove that the annual revenue of the city for the two preceding years had not exceeded $1,000 per annum, and that this amount had been sufficient to pay the expenses of the municipality. There was also evidence that the annual sales of the resident merchants ranged from $7,000 to $16,000, and the net profits from such sales did not exceed $1,250 a year. The defendant contended that the tax was, under the circumstances, unjust and unreasonable. The majority opinion held that, under previous decisions of the court, such license could be used for the purpose of raising revenue; that, being a tax, "it knows no limit other than the neces-

sities of the public treasury, and the discretion of the taxing power;" that it must be flagrant abuse of the power to warrant the interference of the court, and that the tax was not unreasonable because it fell on transient merchants alone and not upon both transient and resident merchants, thus requiring of the former only a daily payment of $10 for the few days they transacted their business within the town. Upon this distinction the reasoning of the Illinois courts in the cases of *City of Peoria* v. *Gugenheim,* 61 Ill. App. 374, and *City of Carrolton* v. *Bazzette,* 159 Ill. 24, 42 N. E. 837, 31 L. R. A. 522, was held not to apply to the case under consideration. It was from the part of the opinion holding the tax reasonable that PORTER, J., dissented. It is argued in the dissenting opinion of the learned judge that the fourteenth amendment to the Federal Constitution, "protects the stranger within the gates equally with the oldest inhabitant," and "it forbids a city from suppressing or prohibiting a lawful business under the guise of an attempt to regulate, license or tax such business." It is also argued that the tax was unreasonable under the circumstances, for the ordinance required the daily payment whether the transient merchant remained one day or six months. Ordinances similar to this one of the city of Lebanon have usually been attacked, upon one or more of three grounds in a majority of the cases. The *first* has to do with the power of municipalities to license occupations, and especially their right to raise revenue by such license. The *second* considers the limitation upon such power that the tax must not discriminate. The *third* raises the question of the amount of the license fee. Is it reasonable or unreasonable?

What power then has a municipality to license or tax trades and occupations? The state may in the exercise of its police power and for purposes of regulation impose the burden of taking out a license upon occupations, trades or professions and require the payment of a fee before permitting the individual to engage in the business or vocation. The regulations may go to the extent of fixing the place, manner or time of carrying on such business, and may also place limits upon the number and personal qualifications of those who seek to engage in it. The police power and the taxing power are both inherent, so the state, in the absence of constitutional limitations, can require that such license be taken out either for the purposes of revenue or for regulation. *Kentz* v. *City of Mobile,* 120 Ala. 623; *Los Angeles County* v. *Eikenberry,* 131 Cal. 461; *Johnston* v. *City of Macon,* 62 Ga. 645; *Gundling* v. *Chicago,* 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Hogan* v. *Indianapolis,* 159 Ind. 523, 65 N. E. 525; *Springfield* v. *Smith,* 138 Mo. 645, 40 S. W. 757; *Fretwell* v. *City of Troy,* 18 Kan. 271; *In re Martin,* 62 Kan. 638, 64 Pac. 43; *City of Ogden* v. *Crossman,* 17 Utah 66, 53 Pac. 985. However, when the state came to delegate this power to the municipalities there was at first some question, but now by statutes or under the decisions of the courts it has become usual for the state so to confer it and to allow its exercise for both purposes. *Van Hook* v. *Selma,* 70 Ala. 361; *San Jose* v. *S. J. & S. C. Ry. Co.,* 53 Cal. 475, 481; *Johnston* v. *City of Macon,* 62 Ga. 645; *Fretwell* v. *City of Troy,* 18 Kan. 271; *City of Newton* v. *Atchison,* 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; *St. Louis* v. *Bircher,* 76 Mo. 431; *Magneau* v. *Fremont,*

30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786; *State* v. *French,* 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590; *Marmet* v. *State,* 45 Ohio St. 63, 12 N. E. 463; *Lent* v. *Portland,* 42 Ore. 488, 71 Pac. 645; *State* v. *Hayne,* 4 S. C. 403; *State* v. *Stephens,* 4 Tex. 137; *Woodall* v. *Lynchburg,* 100 Va. 318, 40 S. E. 915. The two Kansas citations have clearly made it the law of that state that the powers under discussion can there be delegated for all purposes, but where this is not the case the distinction between licensing and taxing becomes of the utmost importance. The police power and the power to tax are separate and distinct. This distinction is of equal importance whether the state itself or one of its municipalities to which the right has been delegated is attempting to exercise it. As a rule the power to regulate by license does not give the power to raise revenue by license, but, when it appears to have been the legislative intent that such power should be given, the courts will so construe a charter or enactment. *Davis* v. *Macon,* 64 Ga. 128; *State* v. *Hoboken,* 33 N. J. L. 280. Neither can the state under the guise of regulating by the police power levy a tax, for the power to regulate is not the power to tax. *Van Hook* v. *Selma,* 70 Ala. 361; *Ottumwa* v. *Zekind,* 95 Iowa 622; *North Hudson County R. Co.* v. *City of Hoboken,* 41 N. J. L. 71; *Cache County* v. *Jensen,* 21 Utah 207, 61 Pac. 303. Conversely the power to raise revenue by license does not give the power to regulate. *Johnston* v. *City of Macon,* 62 Ga. 645. Still some courts have held that the power to regulate by license may be used to raise a reasonable revenue. The practical value of the distinction, as applied to licensing trades and occupations, is apparent, as it controls the validity of an ordinance both as to its purpose and as to the amount charged for taking it out or the fines imposed for a violation. When the ordinance is passed in the exercise of the police power it must be passed for the purpose of regulation, and in such case the fee is limited to the cost of supervision and administration. The amount charged must not be so large as to practically levy a tax, nor can it amount to a prohibition. *State* v. *Galvin,* 67 Conn. 29, 34 Atl. 708; *Fretwell* v. *Troy,* 18 Kan. 271; *Vansant* v. *Harlem Stage Co.,* 59 Md. 330; *Mankato* v. *Fowler,* 32 Minn. 364, 20 N. W. 361; *State ex rel. Wyatt* v. *Ashbrook,* 154 Mo. 375, 55 S. W. 627; *Caldwell* v. *Lincoln,* 19 Neb. 569, 27 N. W. 647; *North Hudson County Ry. Co.* v. *Hoboken,* 41 N. J. L. 71. To this general rule there is, however, an important exception. In the case of trades or occupations which are injurious to health or morals, the municipality may, in its discretion, place the amount of the license fee so high as to prohibit the carrying on of the business. This can be done only under the police power and for the protection of the public. *Howland* v. *City of Chicago,* 108 Ill. 496; *Walcott* v. *People,* 17 Mich. 68. But the distinction is clearly made here between a business or occupation of this character and an honorable or useful trade or profession. The exception stated can not be made to apply to the latter, even though they stand in need of regulation. Any charge over and above the necessary amount can be sustained only under the power to tax, as delegated to the municipality by the state through statute. And when the question becomes one of taxation, the usual limitations incident to the power to tax apply. The power to raise revenue by licensing occupations can not

inhere in a municipality, and can only be exercised by virtue of an express grant and by the use of plain terms or by necessary implication. The bare right to license for regulation must be plainly conferred, and the power to license for the purpose of raising revenue must be given in even more clear and unambiguous terms. *Kniper* v. *Louisville,* 7 Bush (Ky.) 599; *New Iberia* v. *Migues,* 32 La. Ann. 923; *St. Paul* v. *Briggs,* 85 Minn. 290, 88 N. W. 984; *Cache County* v. *Jensen,* 21 Utah 207, 61 Pac. 303. These questions were not raised in the case under consideration except incidentally, for by the statute the power to tax the occupation of merchants by license was clearly granted, and, under the former decisions of the Supreme Court of Kansas, it could not be denied to the city. The fee in question was therefore a tax and nothing else.

When, however, useful trades and occupations are thus taxed and revenue is the object of the ordinance, important limitations apply. Leaving out of consideration the federal question sometimes involved, it is difficult to classify the various restrictions from the cases, but two propositions are settled. The license must not discriminate and must not prohibit or be unreasonable. These are the second and third of the three points usually raised. That there must be no discrimination means, in general, that the license tax must operate equally upon all the individuals of the class. *In re Yot Sang* (D. C.), 75 F. 983; *City of Ft. Smith* v. *Scruggs,* 70 Ark. 549, 58 L. R. A. 921; *Stewart* v. *Kehrer,* 115 Ga. 184; *Braun* v. *City of Chicago,* 110 Ill. 186; *City of Terre Haute* v. *Kersey,* 159 Ind. 300, 64 N. E. 469; *City of Leavenworth* v. *Booth,* 15 Kan. 627; *Bullett* v. *Paducah,* 8 Ky. L. 870, 3 S. W. 802; *Brown* v. *Selser,* 106 Ia. 691; *Ash* v. *People,* 11 Mich. 347; *City of St. Louis* v. *Bowler,* 94 Mo. 630; *State* v. *French,* 17 Mont. 54, 30 L. R. A. 415; *Magneau* v. *City of Fremont,* 30 Neb. 843, 9 L. R. A. 786; *State* v. *Carter,* 129 N. C. 525; *Radebaugh* v. *Plain City,* 11 Ohio Dec. 612; *Mechanicsburg* v. *Koons,* 18 Pa. Super. Ct. 131; *Hill* v. *Abbeville,* 59 S. C. 396, 38 S. E. 11; *City of Columbia* v. *Beasley,* 20 Tenn. (Humph.) 232; *Huefling* v. *City of San Antonio,* 85 Tex. 228, 16 L. R. A. 608; *Morrill* v. *State,* 38 Wis. 428; *State* v. *Willingham,* 9 Wyo. 290, 52 L. R. A. 198. But a bona fide division of occupations into classes is not discrimination. The state can, and when the authority is given, the municipality may, judge what are separate classes, but it must be an actual and reasonable classification. *City Council of Augusta* v. *Clark & Co.,* 124 Ga. 254, 52 S. E. 881; *City of Waukon* v. *Fisk,* 124 Iowa 464, 100 N. W. 475; *Brady* v. *Mattern,* 125 Ia. 158, 100 N. W. 358; *In re Watson,* 17 S. D. 486, 97 N. W. 463. Furthermore it is discrimination where the burden is placed upon non-residents only. *City of Saginaw* v. *McKnight,* 106 Mich. 32, 63 N. W. 985; *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633; *Borough of Sayre* v. *Phillips,* 148 Pa. 482, 16 L. R. A. 49; *Borough of Shamokin* v. *Flannigan,* 156 Pa. 43. And the ordinance is void if it discriminates against non-residents by favoring residents of the same class. *Morgan* v. *City of Orange,* 50 N. J. L. 389; *Thompson* v. *Ocean Grove Camp Meeting Ass'n,* 55 N. J. L. 507, 26 Atl. 798. In *People* v. *Russell,* 49 Mich. 619, 14 N. W. 568, Mr. JUSTICE COOLEY said, "It seems to us that this ordinance is aimed at non-residents, and there is room for the suspicion that it was designed for the benefit of

residents and therefore open to the criticism that it is in restraint of trade." In *Brooks* v. *Mangan* (*supra*), the ordinance was held objectionable because "It practically exempts residents from its provisions while imposing so unjust and unreasonable a license upon non-residents." In general any discrimination between the two will render an ordinance void. *Ex parte Deeds,* 75 Ark. 542, 87 S. W. 1030; *Gould* v. *City of Atlanta,* 55 Ga. 678; *Lucas* v. *City of Macomb,* 49 Ill. App. 60; *Kiel* v. *Chicago,* 176 Ill. 137; *City of Indianapolis* v. *Bieler,* 138 Ind. 30; *Simrall* v. *Covington,* 90 Ky. 444; *City of St. Louis* v. *Consolidated Coal Co.,* 113 Mo. 83; *Morgan* v. *Orange,* 50 N. J. L. 389; *Sipe* v. *Murphy,* 49 Ohio St. 536; *Nashville* v. *Althrop,* 5 Cold. (Tenn.) 554; *Clements* v. *Casper,* 4 Wyo. 494, 35 Pac. 472, and the cases cited above. The contrary is held in *City of Ottumwa* v. *Zekind,* 95 Iowa, 622, 29 L. R. A. 734, and *Temple* v. *Sumner,* 51 Miss. 13, on the ground that the word "transient" refers to the nature of the business, and not to the residence of a transient merchant. The discrimination in these cases may take various forms. It may be that fees are remitted when selling to resident merchants alone. *Nashville* v. *Althrop* (*supra*); *Clements* v. *Casper* (*supra*). There may be a proviso excepting the resident merchants. *Borough of Sayre* v. *Phillips* (*supra*). Such resident merchants as have paid a local mercantile tax may be excepted. *Borough of Shamokin* v. *Flannigan* (*supra*). The ordinance by its very terms may apply to transients or non-residents, *Ex parte Deeds* (*supra*); *Gould* v. *City of Atlanta* (*supra*). Or the ordinance may by its operation in fact discriminate and, though innocent in its terms, be held void. *People* v. *Russell* (*supra*); *Thompson* v. *Ocean Grove Camp Meeting Ass'n* (*supra*). Both residents and non-residents may be taxed, but the latter at a higher rate. *Morgan* v. *Orange* (*supra*). Or it may be that no license is required for the sale of articles manufactured by the residents of the city. *Lucas* v. *City of Macomb* (*supra*). This matter of discrimination does not seem to have been brought to the attention of the court in the case under consideration, but it is hard to see how the Lebanon ordinance does not offend in several particulars. By its terms it applies to transients only and, while a transient is not necessarily a non-resident, the practical effect of its operation is against non-residents in favor of residents. The Court distinguishes the case from the Illinois cases upon the very ground that the license falls upon transients and not upon resident merchants. The statute allows a municipality to license merchants. It may be questioned whether a classification as transients is bona fide. Furthermore the tax is levied only upon such transients as may be selling articles usually kept for sale by resident merchants.

The second limitation upon this form of taxation is that the license must not be prohibitive or unreasonable. The statutes conferring the powers are strictly construed by the courts, but when the power has been once clearly delegated a license imposed under it is deemed to be reasonable until the contrary is proved, and this question is for the courts to decide. It is a question of law. *Kingsley* v. *Chicago,* 124 Ill. 39; *City of South Bend* v. *Martin,* 142 Ind. 31, 29 L. R. A. 531; *Iowa City* v. *Newell,* 115 Iowa 55, 87 N. W. 739; *In re Martin,* 62 Kan. 638, 64 Pac. 43; *Kniper* v. *Louisville,* 7

Bush (Ky.) 599; *Mason* v. *Cumberland,* 92 Md. 451; *Van Baalen* v. *People,* 40 Mich. 258. It is admitted that the municipality is the proper judge of its own needs and of the amount of the license tax, but it must be reasonable. In Kansas the requirement is not so strict. There must be a gross abuse of its power by the city, *In re Martin* (*supra*), and before the courts can declare a tax unreasonable and void it must appear that there has been such unjust discrimination against the business that it is forced to bear more than its share of the expenses of the city government. *Fretwell* v. *City of Troy,* 18 Kan. 271. Under the police power dangerous occupations may be prohibited, but, if the power to license is to be lawfully exercised for the purpose of raising revenue, the fees for carrying on useful trades and occupations, while thus left in a large measure to the discretion of the city government, must not be so high as to be unreasonable or prohibitory and so defeat the very purpose for which they were imposed, the filling of the municipal treasury. *Ex parte Burnett,* 30 Ala. 461; *Morton* v. *Mayor and Council of Macon,* 111 Ga. 162, 50 L. R. A. 485; *City of Chicago* v. *Gunning System,* 214 Ill. 628, 73 N. E. 1035; *City of Lyons* v. *Cooper,* 39 Kan. 324; *People* v. *Russell,* 49 Mich. 617, 14 N. W. 568; *City of Mankato* v. *Fowler,* 32 Minn. 364; *City of Jackson* v. *Newman,* 59 Miss. 385; *Caldwell* v. *City of Lincoln,* 19 Neb. 569; *Ex parte Gregory,* 20 Tex. App. 210; *Cache County* v. *Jensen,* 21 Utah 207, 61 Pac. 303. Many of the cases in which the courts deal with the question of what is reasonable and what is unreasonable fall clearly upon the one side or the other. Some which stand nearer the border-line might well be examined. A license fee of $200 per year upon an auctioneer is reasonable in Chicago. *Wiggins* v. *Chicago,* 68 Ill. 372. Fees ranging from $5 to $25 per year on foot-peddlers, and running as high as $100 when two horses are used, are not unreasonable. *People* v. *Hotchkiss,* 118 Mich. 428; *Kneeland* v. *City of Pittsburg* (Pa.), 11 Atl. 657; *Rosenbloom* v. *State,* 64 Neb. 342. An auctioneer's fee of $5 for each auction day is reasonable. *Fretwell* v. *City of Troy,* 18 Kan. 271. And a fee upon hucksters of $35 per half year has been sustained. *Kansas City* v. *Overton,* 68 Kan. 560, 75 Pac. 549. On the other hand, $500 a year from druggists selling intoxicants in a town of 1600 inhabitants is illegal and prohibitive. *City of Lyons* v. *Cooper,* 39 Kan. 324, 18 Pac. 296. A fee of $10 for the first and $5 for each subsequent day from a peddler is unreasonable. *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633, and one of $10 per day upon transient merchants "borders very closely upon the line." *City of Saginaw* v. *McKnight,* 106 Mich. 32, 53 N. W. 985. A license fee of $12 per day and not issued for less than ten days to sell bankrupt stock at auction is prohibitive. *Caldwell* v. *City of Lincoln,* 19 Neb. 569. A peddler's fee of $3 a day or $15 a week is held unreasonable and prohibitive in *Borough of Sayre* v. *Phillips,* 148 Pa. 482, 16 L. R. A. 49, and one of $10 per day upon transient merchants is held burdensome and void in *City of Carrollton* v. *Bazzette,* 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522. Also in *City of Peoria* v. *Gugenheim,* 61 Ill. App. 374, a similar fee of $200 a month is held to be unreasonable, discriminatory and void. It is difficult to draw any exact line from the decisions, for each case is controlled by its own particular circumstances. The purpose of the levy, the needs of the city,

its size and the amount of business done are all important factors. Applying these tests to the ordinance in the case under discussion, and considering the circumstances, the cases would seem to support the dissenting opinion.

F. B. F.

"SIC UTERE TUO UT ALIENUM NON LAEDAS."—By sanction of judicial opinion, the expression that the rightful use of one's own property cannot be a legal wrong to another; and, if damage happens, it is *damnum absque injuria,* has long been recognized, at least in the abstract, as a truism. As a proposition generally accepted, it may be stated that every man has a right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without malice or negligence on his part, an unavoidable loss occurs to his neighbor, it is damage without any legal wrong. However, this principle has limitations. The courts are not disinclined to modify it when exigencies arise which would result in injustice, were it laid down as a hard and fast rule. Thus, in a recent case, the pumping of contaminated water from a coal mine into a stream used by the plaintiff for domestic purposes, rendering it unfit for use, the defendant coal company was held liable for damages, although such disposal of the water was necessary to the operation of the mine. *H. B. Bowling Coal Co.* v. *Ruffner* (1907), — Tenn. —, 100 S. W. Rep. 116.

The court looked upon the pollution of the stream as an invasion of an established right, such as will, in general, *per se,* constitute an injury for which damages are recoverable, and based its decision upon the broad ground that it is not permissible, under the facts involved, for a man to use his own property so as to injure the property of his neighbor. A contrary view has become the settled doctrine in Pennsylvania, set forth in the leading, but much criticised, case of *Sanderson* v. *The Pennsylvania Coal Co.,* 113 Pa. 126, 6 Atl. 457. S. purchased a tract of land in the coal regions, upon which he erected a handsome residence. One of the principal inducements to the purchase was that a stream of pure mountain water ran through the tract. This stream was actually used by him for culinary, bathing and other purposes. Shortly after the improvements were completed, defendants opened a coal mine above the land, the water from which so polluted the stream as to render the water unfit for use. The court held that the land on the lower level owed a natural servitude to that above in respect of receiving, without compensation by the owner, the water naturally flowing from it, and a pollution of the stream by the running into it of acidulated water from the mine was *damnum absque injuria,* where the stream formed the natural drainage of the basin, and the mine was conducted in the ordinary and usual mode of mining. The decision appears to have been founded upon expediency, and it would seem that its extreme views were justified by the peculiarity of local conditions. The case presents special circumstances as regards the great relative value of the minerals as compared with the surface of the surrounding country. It was followed, the next year, by another Pennsylvania case, and the doctrine sustained, that no recovery can be had by a lower against an